Lexis

No. 03-74

Supreme Court, U.S.
FILED
JUL 2 9 2003
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In The

Supreme Court of the United States

PAW-PAW'S CAMPER CITY, INC.,

Petitioner,

v.

JAMES V. JIMENEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF ON BEHALF OF RESPONDENT JIMENEZ IN OPPOSITION TO PAW-PAW'S CAMPER CITY, INC.'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Jimenez urges the rejection of Petitioner Paw-Paw's Camper City, Inc.'s ("Paw-Paw's") petition for writ of certiorari because it fails to present any legitimate argument why the punitive damage award affirmed by the Fifth Circuit should be overturned. Respondent submits that the punitive damage award was based upon the evidence, is an amount analogous to those authorized by Congress, and was not excessive under this Court's decisions.

Respondent adopts, for purposes of this brief, the material in Paw-Paw's Petition for Writ of Certiorari under the headings, "List of Interested Parties" and "Jurisdiction." With regard to Petitioner Paw-Paw's "Course of Proceedings and Disposition of the Case Below," Respondent notes that the Petitioner omitted the Fifth Circuit's award of costs and attorney's fees to Respondent in opposing Petitioner's appeal to that court. Further, it should be noted that no judge on the Fifth Circuit requested that the court be polled to consider Paw-Paw's request for rehearing en banc. (Paw-Paw's Petition, p. 65a)

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioner Paw-Paw's omitted in its presentation of "Statutory and Regulatory Provisions Involved" that

Respondent also prevailed on his hostile work environment claims under 42 U.S.C. § 1981. The statue reads as follows:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Further, 42 U.S.C. § 2000e-5(k) provides in part that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs."

Similarly, 42 U.S.C. § 1988 provides in part that "[i]n any action to enforce a provision of sections 1981 [or] 1981a . . . , the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

STATEMENT OF THE FACTS

The jury, composed of six Caucasians and one African-American, heard overwhelming evidence of defendant Paw-Paw's discrimination and harassment against Mr. James Jimenez in violation of his rights secured under both Title VII, 42 U.S.C. § 2000e, et seq. and 42 U.S.C. § 1981. Mr. Jimenez is Hispanic and of Mexican descent. Paw-Paw's is a regional corporation which sells large recreational vehicles throughout the Gulf South. Not only did the jury find that Paw-Paw's conduct created a hostile work environment, the district court wrote after its thorough review of the evidence that, "the court finds a high degree of reprehensibility in the repeated, extensive, ethnically hostile verbal abuse by Paw-Paw's managers that plaintiff experienced, as found by the jury." (Paw-Paw's Petition, p. 28a)

Mr. Jimenez was hired to be a salesman at Paw-Paw's Picayune, Mississippi, store in March of 1996. He was transferred to Paw-Paw's Gulfport store in August of 1996 where he eventually rose to the position of store manager. At the time that he was promoted to Gulfport's store manager, W.B. "Dub" Herring, Jr., the owner of Paw-Paw's, advised him that Paw-Paw's policy was that "We don't hire darkies." This comment placed Mr. Jimenez, as the only person of color in sales/management, on notice that he

would be under scrutiny and his performance would need to exceed that of white managers.

Subsequently, Paw-Paw's hired Mr. Matthew Margetta, who became Paw-Paw's general manager, part owner, and Mr. Jimenez's supervisor. While employed at the Gulfport store, Mr. Jimenez heard from second hand sources that racial slurs were being directed toward him. Nevertheless, his sales were good at the Gulfport store as manager.

In March of 1998, Mr. Jimenez was transferred to Paw-Paw's largest store in Mobile, Alabama, to serve as general sales manager, the store's top position. Mr. Margetta also maintained an office at the Mobile store. During this time, on the occasions that Mr. Margetta would be in a "bad mood," he would call Mr. Jimenez a "beaner" or "wetback." "Beaner" is a reference to Mexican beans and a slur used against Mexicans signifying they can only afford to eat beans. "Wetback" is a slur which labels someone as an immigrant who illegally crossed the Rio Grande River into this country. Mr. Jimenez related one occasion where Mr. Margetta cursed and yelled at him in front of customers calling him a "F – -ing Mexican." Mr. Margetta, in response to Mr. Jimenez's complaints about the name calling, advised him to not be "so sensitive." The racial slurs against him occurred about three to four times per week during the eight month period that he worked in Mobile, Alabama.

Mr. John Wimbrow, a former Paw-Paw's manager, testified that the racial slurs directed from Mr. Margetta and Chuck Markham, another manager, to Mr. Jimenez included "little Mexican," "spicenstein," "yo, spic," "yo, beaner." Mr. Wimbrow testified that "a lot of guys would

call [Mr. Jimenez] names." Mr. Wimbrow testified that Mr. Jimenez complained about the slurs and told people, particularly Chuck Markham, to "knock it off" or "that's enough."

Ms. Leslie Hall, a warranty clerk with Paw-Paw's, testified that she knew Mr. Jimenez while working together at the Picayune, Mississippi, store in 1996. After Mr. Jimenez left Picayune, she worked under Don Winchester and Matt Margetta. While working under Mr. Margetta, she heard him refer to Mr. Jimenez as a "spic." Ms. Hall also testified that Don Winchester referred to Mr. Jimenez as a "little spic." She testified that the slurs against Mr. Jimenez were used in a hostile manner.

In November of 1998, Matt Margetta advised Mr. Jimenez that he was being demoted from the Mobile store manager's position to a sales position in Hammond, Louisiana. A week before this demotion, Mr. Jimenez had complained again to Matt Margetta about the slurs. Mr. Wimbrow testified that he believed that Mr. Jimenez's "Mexican appearance" contributed to his demotion and that he was considered a "token" amongst Paw-Paw's all white sales and management staff. Racial slurs against Mr. Jimenez continued during his tenure as Hammond's store manager. Chuck Markham, the Mobile store manager, continued calling him "spic" or "spicenstein" on "quite a bit" of occasions. Mr. Margetta, Mr. Jimenez's supervisor, referred to him as "spic" and "beaner" by telephone approximately two to three times per week during this period of time. Mr. Floyd Feske, a co-employee at Hammond, also testified that he would hear Matt Margetta refer to Mr. Jimenez as "beaner" and "spic" in an ugly manner.

After Mr. Jimenez's second demotion, Mr. Wagner, the new Hammond store manager, used slurs against Mr. Jimenez also in the presence of customers. These included "wetback," "beaner" and comments in front of customers such as "Hey, got your green card in the office." On one occasion while discussing the employment application for salesperson submitted by Jermaine Washington, an African-American, Mr. Wagner reminded Mr. Jimenez that Paw-Paw's did not hire "darkies" and asked Mr. Jimenez "how the hell did you slip by?" Mr. George Rinker, a retired U.S. Navy sailor, was present during this conversation, and confirmed Mr. Wagner's slur against Mr. Jimenez in the context of rejecting Mr. Washington's application. Mr. Floyd Feske testified that he, too, heard Dave Wagner call Mr. Jimenez "spic," "greaser," "beaner," and ask Mr. Jimenez in front of the staff, "How did you get into the United States?" Mr. Feske testified that Chuck Markham, Mobile's manager, also called Mr. Jimenez a "spic." Mr. Jimenez continued to complain to Mr. Margetta about these slurs to no avail. Mr. Feske confirmed hearing Mr. Jimenez's complaints to Mr. Margetta. The slurs from both Mr. Wagner and Mr. Margetta continued until Mr. Jimenez left Paw-Paw's in July of 1999.

Ms. Tanya Strange, a Paw-Paw's employee who also worked with Mr. Jimenez in Hammond between the Fall of 1998 through March of 1999 as a warranty administrator, testified that she also heard Matt Margetta refer to Mr. Jimenez as "spic" or "little Mexican." She also heard Dave Wagner "always put Jimmy down," tell him to "go back to Mexico City," and treated Mr. Jimenez terribly. She stated Mr. Wagner talked to Mr. Jimenez like a "dog," always made "racial" comments, and treated him in a very "degrading" manner. She testified that the racial slurs

bothered Mr. Jimenez "very much" and that he became "frustrated" by and "tired" of the racial slurs. Ms. Strange also corroborated hearing that Paw-Paw's policy was not to hire people of color because they were considered by management to be "no good workers."

Paw-Paw's own witnesses corroborated the absence of any "good-faith" effort to comply with federal anti-discrimination laws. Read Doolittle, a sales manager testifying on behalf of Paw-Paw's, speculated that he heard a lot of Paw-Paw's employees use racial slurs while working. Mr. Doolittle testified that he, too, heard Chuck Markham refer to Mr. Jimenez as a "spic." Incredibly, Mr. Doolittle, a Paw-Paw's manager, did not view the use of slurs to be wrong if spoken in general conversations at work. Notably, Paw-Paw's did not produce Don Winchester, Chuck Markham, or David Wagner at trial or by deposition to deny their racial slurs. The jury, having heard the above testimony, obviously rejected Paw-Paw's owner Matt Margetta's denial of using slurs. Paw-Paw's remaining witnesses, most of whom were current employees, only testified that they personally were not present when slurs were used but were not able to testify that the slurs said out of their presence did not in fact occur. Mr. W.B. Herring, Paw-Paw's president, in addition to having a "no hiring of darkies" policy, exemplified Paw-Paw's reckless indifference to stopping workplace discrimination by admitting in his March 2001 deposition that he was unaware whether Paw-Paw's even had a procedure by which employees could lodge a harassment complaint. Matt Margetta, the general manager in charge of corporate operations and part owner, demonstrated his own intentional malice and reckless indifference by engaging in

the very same racist conduct that was purportedly prohibited by the policy he drafted.

REASONS FOR DENYING PAW-PAW'S WRIT

Paw-Paw's presents to this Court many of the same arguments which have already been rejected by the jury, the district court, and the Fifth Circuit. Paw-Paw's writ should be denied because (1) the Fifth Circuit correctly affirmed both the jury's and district court's finding of a hostile work environment, (2) the $80,000 punitive damage award was not excessive under this Court's decisions, and (3) the Fifth Circuit decision neither perpetuates nor creates an inter-circuit dispute regarding the relationship between punitive and compensatory damages.

I. The punitive damage award was based upon the evidence and was not excessive under this Court's decisions of *Gore* and *Campbell*.

A. The Fifth Circuit correctly affirmed the jury's and the district court's finding that Paw-Paw's subjected Mr. Jimenez to a hostile work environment.

A hostile work environment exists if the harassment is sufficiently severe and pervasive enough that a reasonable person would find it to be hostile. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-789 (1998). Discriminatory verbal intimidation, ridicule, and insults may be sufficient to create an abusive working environment that violates Title VII. *Mota v. University of Tex.*, 261 F.3d 512, 524 (5th Cir. 2001). Section 1981a authorizes the assessment of

punitive damages against an employer who subjects an employee to a hostile work environment.

After receiving an instruction consistent with this Court's decision of *Kolstad v. American Dental Association,* 527 U.S. 526 (1999), the jury assessed punitive damages against Paw-Paw's due to its malicious and reckless indifference to Mr. Jimenez's federally protected rights. As set forth above in the Statement of Facts, the overwhelming evidence established that Paw-Paw's ownership/management not only knew that race and national origin harassment was prohibited by law but Paw-Paw's ownership/highest management engaged in same against Mr. Jimenez up to two to three times per week throughout much of his employment. Both the district court and the Fifth Circuit correctly confirmed the jury's finding of a hostile work environment only after an extensive and proper review of the record. Paw-Paw's petition should be denied because it ignores the evidence and requests this Court to do the same.

B. The $80,000 punitive damage award upheld by the Fifth Circuit is not excessive under this Court's decisions of *Gore* and *Campbell.*

The $80,000 punitive damage award upheld by the Fifth Circuit is not excessive under either of this Court's decisions of *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 1601 (1996) or *State Farm Mutual*

Automobile Insurance Company v. Campbell, ___ U.S. ___, 123 S.Ct. 1513 (2003) as asserted by Paw-Paw's.[1]

In *Gore*, the Supreme Court stated that a jury has considerable latitude in granting punitive damages, which will be overridden as a due process violation "only when an award can be fairly characterized as 'grossly excessive'" in relation to the "State's legitimate interests in punishment and deterrence." *Gore* at 568. This Court in *Gore* emphasized that the award was excessive because it overreached, that is (1) defendant BMW did not have adequate notice that its conduct actually violated Alabama's statute, (2) BMW did not have notice of the magnitude of the punishment Alabama may impose on minor infractions, and (3) the award represented Alabama's attempt to dictate the policies of the other 49 states by punishing BMW for conduct occurring in other states. *Id.* at 571-573, 577-578.

In *Campbell*, this Court, applying *Gore*'s three guideposts, vacated the punitive damage award only after it determined that the award impermissibly punished defendant State Farm for conduct that "bore no relation to" the claims actually before the trial court. *Id.* at 1523.

Here, unlike *Gore* and *Campbell*, the punitive damage award is directly related to Paw-Paw's reprehensible conduct toward Mr. Jimenez. The "overreaching" found in

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[1] The district court misapplied *Gore's* three guideposts in reaching the decision to remit the jury's award of $161,000 to $80,000. Respondent Jimenez submits in his cross-petition for writ of certiorari that the application of *Gore*'s three guidepost analysis to this award was unnecessary; further, if such an analysis was necessary, the remittitur was improper under *Gore* and the jury's punitive damage award of $161,000 should be reinstated.

Gore and *Campbell* is not present here. Paw-Paw's baseless assertion that it was punished for its discrimination against Mr. Jermaine Washington ignores that the evidence of same was inseparably related to harassment directed at Respondent Jimenez. As stated above, Dave Wagner, in the context of rejecting Mr. Washington's application pursuant to Paw-Paw's "no darkies" policy, asked Mr. Jimenez how he, being a person of color, "slipped by" Paw-Paw's prohibition against hiring people of color for sales positions. Moreover, ample evidence established that Paw-Paw's conduct was deserving of punishment independent of any discrimination related to Mr. Washington. Therefore, the punitive damage award was proper under *Gore's* first guidepost.

Under *Gore*'s second guidepost, the punitive damage award affirmed by the Fifth Circuit should be proportionate to either the actual *or* the "potential" harm that could have arisen from Paw-Paw's reprehensible conduct. *Gore, supra,* at 502. Paw-Paw's petition completely ignores the "potential harm" analysis under *Gore's* second guidepost. *Gore's* accounting for the "potential harm" to a plaintiff allows a trier of fact to punish an offender whose conduct is horrendous but may not result in calculable harm.[2] Analyzing the ***potential*** harm is critically important in discrimination cases because the offending employer should not escape punitive damages because the victim suffered little or no damages due to his own durability,

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[2] A hypothetical gunman who shoots into a crowd yet miraculously hits no one should not escape punitive damages under *Gore* since the "potential harm" was great and the conduct reprehensible.

mental strength or ability to obtain another job with equal or better pay.[3]

The ***potential*** harm to Mr. Jimenez can be found by reviewing the amounts awarded for actual harm to plaintiffs in discrimination cases in the Fifth Circuit. In *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002), the Fifth Circuit surveyed several decisions affirming awards for actual harm to victims of discrimination. The *Salinas* court noted the $100,000 for emotional damages to the plaintiff in *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769 (5th Cir. 1996), $100,000 to the plaintiff in *Williams v. Trader Publ'g Co.*, 218 F.3d 481 (5th Cir. 2000) for emotional distress due to "sleep loss," "severe loss of weight," and "beginning smoking," and $150,000 to the plaintiff in *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001) for emotional damages arising from a failure to rehire. *Salinas* at 831. The Fifth Circuit in *Salinas* ultimately awarded $150,000 to the plaintiff for emotional damages.

A survey of these four comparable Fifth Circuit decisions establishes that the *potential* harm Mr. Jimenez could have suffered included depression, marital trouble, headaches, loss of prestige and social connection, despondence, discouragement, intestinal problems, and commencement

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[3] See *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352 (2nd Cir. (N.Y.), Nov 16, 2001) where the Second Circuit noted that the "unseemliness for a defendant who engages in malicious or reckless violations of legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm." There, the Second Circuit affirmed a punitive damage award of $100,000 and $0 in compensatory damages or a 100,000 to 0 ratio.

of addictive habits such as smoking.[4] They likewise show that the potential harm to Mr. Jimenez is valued between $100,000 and $150,000 in the Fifth Circuit. The conduct in these four decisions is materially identical to, or even less severe than that suffered by Mr. Jimenez. Salinas did not get a promotion; Forsyth was transferred; Williams was fired, not repeatedly harassed; and Giles was simply rejected for rehire based on a disability, but was not harassed. *See Salinas,* 286 F.3d 827 (5th Cir. 2002). This discrimination pales in comparison to that to which Paw-Paw's subjected Mr. Jimenez. Given the "potential" or "likely harm" of $100,000 to $150,000, the subject $80,000 punitive damage award yields a ratio of 1 to 1.25 or 1 to 1.87.[5] These ratios are unassailable on constitutional grounds and are consistent with both *Gore* and *Campbell.*

Applying *Gore's* third guidepost also refutes any assertion that the punitive damage award upheld by the Fifth Circuit was excessive. *Gore* and *Campbell* require a comparison between the punitive damage award and "analogous" civil penalties that are "authorized" for similar misconduct, not just only those actually "imposed." *Gore* at 583.

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[4] Evidence was presented that as a result of the harassment, Mr. Jimenez physically suffered sleep deprivation, abused alcohol and was diagnosed by Dr. Burl Forgey, psychiatrist, as suffering from "major depression" consistent with someone who has undergone the stressors of racial slurs and discrimination in the workplace.

[5] $80,000/$100,000 = 1/1.25 or $80,000/$100,000 = 1/1.87

Congress has authorized the award of $80,000 expressly and implicitly. Congress in employment harassment cases has specifically authorized awards up to $300,000, inclusive of punitive damages, in Section 42 U.S.C. § 1981a(b)(3)(D). While the damages authorized under 42 U.S.C. § 1981a are not directly applicable to Mr. Jimenez's Section 1981 claims, they are ***analogous*** and do indicate that an award of $80,000 is well within the universe of punitive awards that has been contemplated by Congress. Such a comparison occurred in *Swinton v. Potomac Corporation*, 270 F.3d 794, 820 (9th Cir. 2001), where the appellate court expressly viewed Congress's authorization of $300,000 in damages under Title VII as providing an analogous example of damages to which a court can compare the propriety of a punitive damage award under a § 1981 action as required by *Gore's* third guidepost.[6] The Ninth Circuit ultimately affirmed the jury's award of $1,000,000 in punitive damages for the employment race discrimination claims before it. *Id.*

Moreover, 42 U.S.C. § 1981a(b)(1) contains no language requiring any award of compensatory damages as a prerequisite to awarding punitive damages. Further, Congress has placed no limitations on the amount of damages, either compensatory or punitive, which can be awarded in a 42 U.S.C. § 1981 action nor established any ratio which must exist between these damages. Further, the Fifth Circuit has affirmed awards of $125,000 and

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[6] See also *Romano v. U-Haul International,* 233 F.3d 655, 673 (1st Cir. 2000), holding a punitive damage award that comports with a statute "provides strong evidence that a defendant's due process rights have *not* been violated." (emphasis supplied)

$750,000 in exemplary damages in *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769 (5th Cir. 1996), further evidencing that $80,000 or even the jury's $161,000 is constitutionally sound.[7] As such, Paw-Paw's errs in requesting this Court to impose a ratio or a cap that was not contemplated by Congress particularly since *Gore* admonishes that "substantial deference" should be accorded to "legislative judgments" concerning the appropriate degree of punishment for the conduct at issue. *Gore* at 583.

Paw-Paw's petition also ignores this Court's instruction that there are "no rigid benchmarks that a punitive damages award may not surpass" and that "ratios greater than those we have previously upheld may comport with due process where a 'particulary egregious act has resulted in only a small amount of economic damages.'" *Campbell* at 1524 citing *Gore*. This Court has also held that "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach." *Gore* at 1602. Respondent submits that discrimination cases exemplify the type of case where higher ratios should be permitted given the difficulty in calculating the actual damages caused by racist conduct.

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[7] Page 24 of Paw-Paw's petition misstates the district court's finding. The district court did **not** hold that $80,000 was the highest employment punitive damage award in the Fifth Circuit as asserted by Paw-Paw's. The district court simply stated that 80,000 to 1 was the highest **ratio** it found in the reported Fifth Circuit cases. (Paw-Paw's petition, p. 34a)

Finally, it is impossible to conclude that the $80,000 affirmed by the Fifth Circuit is an amount that "shocks the conscience" when this amount represents less than one month of Paw-Paw's gross ***profit***. Assessing such an award only prevents Paw-Paw's owners from enjoying the benefits of profits it earns over a mere three week period. This represents barely a slap on the wrist by most standards, not a constitutional violation. Any reduction of the jury award moots the intent of punitive damages which are "aimed at deterrence and retribution." *Campbell* at 1520.

The Civil Rights Act was aimed at "eradicating significant areas of discrimination on a nationwide basis." H.R.Rep. 914, 88th Cong., 1st Sess. 18 (1963), U.S. Code Cong. & Admin. News 1964, pp. 2355, 2393. Ultimately, Paw-Paw's petition fails under both *Gore* and *Campbell* because the modest punitive damage award is not "grossly excessive" in relation to the Nation's interest in eradicating the gross racism embraced by Paw-Paw's.

II. The Fifth Circuit decision neither perpetuates nor creates an inter-circuit dispute regarding the relationship between punitive and compensatory damages.

Rule 10 of this Court provides, in part, that a writ will be considered if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." U.S. Sup.Ct. Rule 10(a). No such conflict exists here.

Paw-Paw's cites only one First Circuit case and two district court cases to support an alleged conflict between

those courts and the Second and Fifth Circuits regarding the relationship between punitive and compensatory damages and the application of *Gore*. A review of these cases demonstrates no conflict exists. The First Circuit in *Kerr-Selgas v. American Airlines*, 69 F.3d 1205 (1st Cir. 1995) vacated the punitive damage award because there had not been a timely request for nominal damages. *Id.* at 1214-15. Here, the Fifth Circuit properly affirmed the punitive damage award because the district court had granted a timely request for nominal damages. As such, no conflict exists between this matter and *Kerr-Selgas*. Moreover, the First Circuit in *Kerr-Selgas* was silent as to *Gore* and offered no application of same which could be inconsistent with the district court's application of *Gore* as upheld by the Fifth Circuit.

Similarly, neither of the two district court cases cited by Paw-Paw's – *Parrish v. Sollecito*, 2003 WL 1905613, (S.D.N.Y., Apr 16, 2003) or *Baker v. John Morrell & Co.*, 2003 WL 21355198 (N.D.Iowa) – present a conflict with the Fifth Circuit's decision in this matter. To the contrary, both support the Fifth Circuit's decision and each upholds punitive damage awards greater than that awarded to Mr. Jimenez. In *Parrish*, the district court ordered the plaintiff to accept a remittitur of the punitive damage award from $500,000 to $135,000 or request a new trial. In *Baker*, the district court entered an award of $300,000 in punitive damages after determining that same was not excessive under *Gore*. Assuming *arguendo* that either case presents a conflict, neither are court of appeals' decisions which would qualify under Rule 10(a) as a basis for granting Paw-Paw's petition. The conclusion is inescapable that Paw-Paw's petition fails to present any inter-circuit "conflict" as contemplated by this Court's Rule 10.

III. The Court should deny review based upon the alleged *intra*-circuit conflict within the Fifth Circuit.

Paw-Paw's curiously argues that this Court should vacate the Fifth Circuit decision in this matter because it allegedly conflicts with the earlier Fifth Circuit decision of *Louisiana Acorn Housing v. Leblanc*, 211 F.3d 298 (5th Cir. 2000). First, U.S. Sup.Ct. Rule 10 makes no provision for this Court to review matters based only upon an alleged *intra*-circuit conflict. Second, the present matter is distinguishable from *Louisiana Acorn* inasmuch as the constitutional violation absent there was present here. Moreover, *Louisiana Acorn* addressed a claim under the Fair Housing Act, not Title VII or Section 1981. Finally, assuming *arguendo* that a conflict did exist between two Fifth Circuit panel opinions, the Fifth Circuit appears to have resolved any conflict in favor of Respondent Mr. Jimenez. This is evident since Paw-Paw's raised its *Louisiana Acorn*-based argument in its petition for rehearing en banc yet no member of the Fifth Circuit, including the two panel members who decided *Louisiana Acorn*, requested that the court be polled in denying Paw-Paw's petition for rehearing en banc. (Paw-Paw's petition, p. 65a).

CONCLUSION

For the foregoing reasons, Respondent Jimenez submits that Paw-Paw's petition for writ of certiorari is without merit and should be denied inasmuch as the jury's finding of a hostile work environment is supported by the evidence. Moreover, the punitive damages award upheld by the Fifth Circuit was not excessive under this Court's decisions of *Gore* and *Campbell*. Paw-Paw's also fails to

demonstrate that the Fifth Circuit decision conflicts with any other court of appeals' decision. Mr. Jimenez seeks additional attorney's fees, costs and expenses under 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988 made necessary in opposing Paw-Paw's petition for certiorari and he reserves the right to pursue same before the appropriate forum.

Respectfully submitted,

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